Supreme Court U.S.
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No. 01-1459

IN THE

Supreme Court of the United States

KENNETH J. ELWOOD, DISTRICT DIRECTOR,
IMMIGRATION COURT OF THE UNITED STATES,

Petitioner,

v.

SABRIJA RADONCIC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT

In accordance with Rule 15.2 of this Court's Rules, Respondent makes the following response to Petitioner's Statement.

1. Aliens in the United States who are subject to removal (formerly exclusion or deportation) are subject to two separate types of detention in physical custody, prior to a final order and after a final order. Pre-order custody is provided in 8 U.S.C. § 1226 and post-order custody is provided in 8 U.S.C. § 1231. The Court recently addressed post-final order custody in *Zadvydas v. Davis*, 533 U.S. 678 (2001). This case involves pre-final order custody under 8 U.S.C. § 1226(c).

Aliens subject to removal proceedings include those stopped at the border and those who have already gained access to the United States. *U.S. ex rel. Mezei v. Shaughnessey*, 345 U.S. 306 (1984) and *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) address the custody of aliens no yet "in" the United States. This case involves an alien already here.

Aliens who are in the United States but subject to removal (deportation) proceedings include lawful permanent residents, illegal border crossers and non-resident aliens who were legally admitted but who are said to have violated their status by a specified act or admission. This case involves an alien who entered the United States illegally. Should Certiorari be granted, a threshold question is whether aliens within the United States are "persons" within the meaning of the Fifth Amendment or whether that provision's protection is to be conditioned on legality of initial entry or maintenance of legal status. *Wong Wing v. United States*, 163

U.S. 228 (1896) and similar cases hold that illegal aliens in the United States are entitled to due process. The issue would seek reconsideration of substantial precedent, contrary to *Zadvydas*.

The specific issue in this case arises because custody of all aliens subject to removal on a variety of criminal convictions are subjected to mandatory detention by the terms of 8 U.S.C. § 1226(c). The detention is without any consideration of offense behavior, family equity, likelihood or relief, contest of removability, danger to the public or likelihood of flight. The only bail hearing such an accused gets is to determine his or her identify, alienage and that the illegal conviction relates to him or her and is as proscribed by 8 C.F.R. § 1226(c).

In cases of removal not subject to 8 U.S.C. § 1226(c), there is a long-standing procedure for release on bail. 8 C.F.R. §§ 3.19 and 236.1(d). The issues on bail are "danger to the public" and "likelihood of flight." In *Matter of Patel*, 15 I&N Dec 666 (BIA 1976), the burden of proof for bail is on the alien, not the I&NS. Compare *United States v. Salerno*, 481 U.S. 739 (1987). Bail proceedings are separate and apart from consideration of the removal proceedings. The I&NS has not only a right of appeal of bail under stay or *supercedeas* 8 C.F.R. §§ 3.38 and 3.19(i)(1), the I&NS also has the right to stay release, of its own act, without permission or supervision of any Court or Board. 8 C.F.R. § 3.19(i)(2).

In these cases the aliens are in custody in county jails used by state authorities for both pre-trial criminals and shorter sentenced criminals. The "beds" are "rented" by the I&NS for custody since the I&NS does not have its own facilities. Thus while removal is "civil" custody is "criminal".

The Immigration Judge held that in its terms 8 U.S.C. § 1125(c) applied to him. Radoncic challenged that statute to seek access to the system of bail described. In light of the flat statutory bar to such proceedings, access to a hearing was possible only if § 1226(c) was unconstitutional. The Immigration Judge held himself bound by the statute. The District Court was affirmed by the Court of Appeals, holding that 8 U.S.C. § 1226(c) denied Respondent due process of law. Should certiorari be granted, the same facts also implicate constitutional issues of Separation of Powers and Bill of Attainder. In § 1226(c) the Congressional act holds that no alien with one of the proscribed convictions could be permitted to qualify for bai[1] under any standard. This adds imprisonment during proceedings to a class of persons who have served their sentences without further hearing. Moreover, it is legislation which makes an adjudicatory decision without any consideration of the facts and circumstances of a particular case, substituting legislation for an established adjudicatory process.

2. Petitioner's second point is wholly related to Respondent's deportation proceedings. Indeed this case is so old it predates the 1996 amendments. Under the Transitional Period Custody Rules of § 303(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 PL 104-208 (IIRAIRA), Respondent would have qualified for bail, not withstanding 8 U.S.C. § 1226(c). *In Re: Adeniji*, Int. Dec. 3417 (BIA 1999). However, he was released from penal custody in May 2000 after the transitional period was ended (April 9, 1998). The merits of Petitioner's (and his wife's) deportation proceeding as subject to a Petition for Review pending in the Court of Appeals for the Second Circuit (#01-4201). Since the Circuit Court has stayed deportation, he is not subject to post-order custody under

the terms of 8 U.S.C. § 1231(a)(2) and, if 8 U.S.C. § 1226(c) is lawful, is still subject to it. The stay precludes beginning the post-order period of removal. 8 U.S.C. § 1231(a)(1)(B)(iii). The merits of Respondent's deportation case would not be before the Court of certiorari were granted.

Of signal significance is the actual charge of deportation made against Radoncic. He was said to be mandatorily held in custody because of conviction for smuggling aliens. He was so convicted in January 1999 based on an August 1996 arrest in Vermont. However, contrary to Petitioner's argument, he was never charged in deportation proceedings for this conviction. Indeed, as stated, he could hardly have been charged in August 1996 for a January 1999 conviction. The Immigration Judge's decision in deportation proceedings, Petition p. 22a, documents the sole charge was "entry without inspection". The Board of Immigration Appeals decision, Petition, p 188, footnote 1, documents the failure to sustain a charge in deportation of "alien smuggling". Never having been charged with that conviction, Radoncic should never have been held subject to § 1226(c) in its terms since "is deportable" in deportation use means actually charged as deportable. *Matter of Ching*, 12 I&N Dec 710 (BIA 1968).

3. Statement is correct.

4. In affirming the District Court, the Court of Appeals relied on it holding in *Patel v. Zemski*, 275 F.3d 299 (3d Cir 2001). However, the Court of Appeals designated their holding in this case as non-precedential, in accordance with Third Circuit Internal Operating Procedure 5.3, which then provided:

> Opinions which appear to have value only to the trial court or the parties are designated by the

> court as unreported and are not sent by the court for publication. These may include, at the option of the majority of the panel, divided panel opinions affirming the judgment of the trial court, granting or denying a petition for review or enforcement of the order of an administrative agency, divided or unanimous opinions reversing or vacating the judgment of the trial court or remanding to the trial court, and per curiam opinions. Per curiam opinions may be utilized for affirming, reversing, vacating, modifying, setting aside, or remanding the judgment, decree, or order appealed from; for dismissing an appeal; for granting or denying a petition for review; and for granting or refusing enforcement of the order of an administrative agency. An opinion that is designated by the court as unreported shall state "unreported, no precedential" on the face of the opinion. [This rule was amended Mar. 1, 2002]

Patel was decided on December 19, 2001. This case was decided on January 4, 2002, by the same panel. Petitioner is seeking certiorari in *Kim v. Ziglar*, 276 F.3d 323 (9th Cir 2002) (S. Ct. #01-1491), a case similar to *Patel v. Zemski*; they did not seek certiorari in *Patel v. Zemski*. Should certiorari be granted in this case, there are additional issues raised by this configuration of holdings, vis

a. The effect of *Patel v. Zemski* under the doctrine of *stare decisis*, inasmuch as certiorari was not sought in that case.

b. The legal and constitutional significance of the instant case as a "non-precedential" decision.

These aspects are potentially significant both as a question of "due process" and as a matter within this Court's role as supervisory of the Courts of Appeals.

REASON FOR DENYING THE WRIT

1. A principal reason for granting certiorari is the division of Circuits. Petitioner argues that there is such conflict between *Patel v. Zemski*, 275 F.3d 299 (3d Cir 2001) and *Parra v. Prettyman*, 172 F.3d 954 (7th Cir 1999) insofar as the Third Circuit granted relief while the Seventh Circuit rejected a due process challenge to the same statute, 8 U.S.C. § 1226(c).

The asserted conflict is less than direct or significant. In *Parra*, the rejection was, in fact, not a holding but a *dictum*. The alien in *Parra* had conceded removability at the hearing level. He did not appeal the Immigration Judge's Order. The Order of the Immigration Judge became final thirty days later. It was never subject to any post-order appeal or motion to reopen or reconsider. Indeed, the Seventh Circuit's opinion notes the absence of even a claim of error in the base order. As such, Parra's custody was not under 8 U.S.C. § 1226(c) when the Court of Appeals decided that case; the custody was under 8 U.S.C. § 1131(a). The language in *Parra* appears to be the result of misinformation or incomplete analysis by the Seventh Circuit. Correction of that dictum in *Parra* is best managed by the Seventh Circuit itself.

What is presented as conflicting is not *Radoncic* but *Patel v. Zemski*. But *Patel* is not before this Court. *Radoncic* followed *Patel* by *stare decisis*. *Patel* was not sought to be reviewed. Assertedly, *Patel* was said to be moot; it was no more nor less moot than *Radoncic* (discussed at point 5 below).

Moreover, *Radoncic* is non-precedential. Under Third Circuit rules it cannot be cited as authority. As such neither circuit's disposition is in conflict with the other. Certiorari is not merited on the claimed ground of conflict.

2. Petitioner appear to argue that although *Kim v. Ziglar*, 276 F.3d 323 (9th Cir 2002); *Hoang v. Confort*, 282 F.3d 1247 (10th Cir 2002); and *Patel v. Zemski*, 275 F.3d 299 (3d Cir 2001) applied constitutional protection to aliens who were lawful permanent residents, certiorari is appropriate because Radoncic, like Parra, entered illegally. Petitioner argues that Radoncic had "little hope" of remaining. However, in his criminal proceedings sentencing, the U.S. District Judge, at sentencing stated:

> In addition, the Court has the following recommendation. This Court has sat through a two-week long trial. The court has reviewed in detail Mr. Radoncic's participation in the offense. The Court finds this to be an extraordinary situation. Whether profit was or was not gained, this defendant did not become wealthy, and this Court finds that a major purpose was in service of his community in Yugoslavia, and in service of his local community in Astoria, New York. And although this Court has no power over the issue, the Court recommends strenuously that this defendant not be deported upon completion of his sentence. And also that this statement from the Court be sent to the court, immigration court, if that's — if the court is to address his deportation.

Radoncic has challenged and continued to challenge the order of deportation. A petition for review on substantive

grounds is pending in the Second Circuit. Parra did not even question his final Order of Removal. The meaningful distinction for pre-trial custody purpose is whether deportation or removability is conceded or challenged. The success or failure of the challenge is reserved to the merits of the case, which is not presented here. Radoncic took hope from the sentence of the District Court at his criminal conviction. The contest continued well past his November 30, 2000, release on I&NS bail. He has been on bail for one and one half years during his contest. Parra went from pre-order to post-order in thirty days. Petitioner's point is inconsistent with the facts of these two cases. Moreover this Court's recent decision in *Zadvydas v. Davis*, *supra*, resolved the issue as to post-order custody.

3. Petitioner asserts that the Court of Appeals is wrong. If by that they mean *Patel v. Zemski* to be distinguished from *Radoncic*, the only distinction is that Mr. Patel was a lawful permanent resident and Radoncic entered without inspection. Both were convicted of aggravated felonies. In both cases, the criminal justice system had no difficulty in granting a bail hearing. Both were admitted to criminal bail. Neither violated bail. Both have been admitted to I&NS bail.

In simplest terms, Petitioner appears to contend that Radoncic is a "person" for criminal justice purposes but is not a "person" for deportation purposes, because of the same crime and conviction solely because of a prior illegal entry. However, if the ground of deportation or removal were the illegal entry itself and not an aggravated felony 8 U.S.C. § 1226(c) would not apply and Radoncic would have been eligible for a hearing without limitation. The alien's objective in this case was access to a hearing for bail which the Immigration Judge denied because of the mandate of 8 U.S.C. § 1226(c) Bail itself is not an issue on this record.

There is no issue of risk to the public. Were there a risk, bail would be denied at the bail hearing by the Immigration Judge. Moreover, unlike criminal bail where the burden is on the prosecutor, in deportation cases the burden of proof is on the alien. Additionally, bail is appealable and release is stayed by I&NS unilateral action. 8 C.F.R. §§ 3.19(i)(1) and (2).

Illegality of entry as a basis to deny due process of law is inconsistent with Congressional grants of amnesty and other relief from illegal entry. In *Zadvydas v. Davis*, *supra*, this Court started its analysis that deportation is a civil rather than a criminal process. Yet criminal process provides for a bail hearing. *Zadvydas* held that deportation is not intended as a punishment. Without bail Respondent would have served an additional 19 months in county jail over and above his penal sentence of 18 months and interim I&NS custody of 10 months.

What Petitioner sought and what he got was a hearing on an application for bail. The actual hearing, as in most Immigration bail proceedings, took only a few minutes. Mostly, the hearings are based on offers of proof by opposing counsel and a brief *voire dire* of the alien by the Immigration Judge. No verbatim record is required or provided. The process required is little enough yet it meets the standard.

If, alternatively, Petitioner wants a broader defense of § 1226(c) based on the nature of the crime rather than mode of entry into the United States, a more serious attack on the Fifth Amendment is underway. Deportation is so serious that it merits quasi-criminal analysis. *Jordan v. DeGeorge*, 341 U.S. 228 (1951) and *see Galvan v. Press*, 347 U.S. 522, 531 (1954).

Periodically this Republic is swept with general and special xenophobia. Post September 11, 2001, the Congress felt it necessary to provide special concern for American Sikhs, many of whom wear beards and turbans as a religious observance. Were the plebeian passions to run the other way the Bill of Rights stands to protect individuals from passions of the moment. While it may be argued that aliens who are not here cannot achieve constitutional protection, present persons must be considered as Fifth Amendment "persons". A contrary holding does violence to the words themselves.

Petitioner argues that the Court of Appeals in *Patel* misinterpreted this Court's acknowledgment in *Zadvydas* that due process "may vary depending on status and circumstances". This comment may well relate to aliens initially stopped at the border as apprehended on the high seas. But the Third Circuit in *Patel* followed its earlier sense of dueness of process in *Chi Thong Ngo v. I&NS*, 192 F.3d 390 (3d Cir 1999), incarceration requires some kind of individualized consideration. In pre-order cases this is provided by 8 C.F.R. §§ 3.19 and 236.1(c) and (d) and in post-order cases by 8 C.F.R. §§ 241.3 and 241.4.

In the extent that Petitioner argues for mandatory pre-order custody for aliens, it argues for that result because of illegal entry, criminal conviction and recency of presence. The argument neglects the fact that custody is in county prisons under the same terms as pre-trial felons and post sentence lesser terms of penal incarceration. This argument is not only unworthy of an American system of justice, it also gives lie to the holding in *Zadvydas* that there is no punishment intended. It seriously undercuts the holding in such cases as *Bugavenitz v. Adams*, 228 INS 585 (1913) that deportation is civil not criminal.

In the instant case the 1996 amendments made custody mandatory, irrespective of the date of the crime or the date of conviction, if the alien committed an aggravated felony or crime of "moral turpitude". It enacts a sanction enforced in a county jail, by legislation rather than adjudication. The sanction is imprisonment which can be avoided only by abandoning all defenses and remedies. Parra chose to do that; Radoncic did not.

5. The Record in this case renders certiorari inappropriate. Radoncic's deportation is stayed pending disposition in the Second Circuit. Under terms of 8 U.S.C. the post-order custody statute does not apply. The present custody issue is not moot.

However, there is no assurance that the issue will remain alive. Were the Court of Appeals to vacate the stay as to rule against Radoncic, the issue ceases to exist. There is also a question as to whether the issue survived the bail hearing of November 29, 2000. The Petitioner had not sought a stay or supercedeas from the from the District Court or the Court of Appeals. It did not appeal the bail order which the Immigration Judge granted. In sum, the record of this case is inappropriate as a vehicle to address the constitutionality of § 1226(c).

This record is further confounded by the non-precedential designation of the decision and the stare-decisis effect of *Patel v. Zemski* in the absence of a petition for certiorari in *Patel*. This record is also inappropriate for certiorari since Radoncic was not subject to mandatory custody even though he was subjected to it by the Immigration Judge. 8 U.S.C. § 1226(c) relates to specific deportation charges. Although Radoncic was convicted of alien smuggling, and alien

smuggling is an aggravated felony which is a basis for mandatory custody, Radoncic was not charged with this conviction as a basis for deportation. *See Matter of Ching*, 121 I&N Dec 710 (BIA 1968) holding that "is deportable" requires a charge of deportability for the imposition of a sanction. Since the only charge against him was "entry without inspection" and that is not a basis for mandatory custody, this record is not appropriate as a case worth of certiorari.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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